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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1159

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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9 Wright and Miller, *Federal Practice and Procedure,* § 2363 6

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Unions Nos. 79, 385, 390 and 512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the National Over the Road and City Cartage Policy and Negotiating Committee, and W. C. Smith, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Florida is unreported. It is reprinted in App. A, pp. 1a-2a, *infra*. The opinion of the Court of Appeals for the Fifth Circuit is reported at 506 F.2d 914. It is reprinted in App. B, pp. 2a-6a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 15, 1975. It is reprinted in App. C, p. 7a, *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does Rule 41(a)(1) F.R.C.P. afford a plaintiff an unqualified right to dismissal of his complaint without prejudice when the trial court has already ruled against his motion for preliminary injunction following a full hearing squarely raising the merits of plaintiff's claim?

RULE INVOLVED

This case involves Rule 41(a)(1) of the Federal Rules of Civil Procedure. That rule is reprinted in App. D, p. 7a, *infra*.

STATEMENT OF THE CASE

A. Proceedings in the District Courts

For purposes of this petition, Petitioners accept the factual background as set forth by the Court of Appeals, pp. 2a-6a, *infra:*

> "Pilot Freight Carriers, Inc. [Pilot] is a common carrier of general commodity freight operating primarily in the eastern United States with lines as far west as Ohio. Its labor relations with non-

supervisory personnel are in the main controlled by the National Master Freight Agreement [NMFA], a nationwide collective bargaining agreement periodically negotiated between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [IBT] on behalf of its locals and a mult'-employer association of which Pilot is a member. In August, 1970, Pilot received authorization from the Interstate Commerce Commission to extend its lines south into Florida, and shortly thereafter established terminals in Jacksonville, Orlando, Tampa and Miami which were linked up to existing lines terminating in the Carolinas. Florida IBT locals at these points took the position that, because of this extension, the non-supervisory personnel automatically became subject to the terms of the NMFA by virtue of an accretion clause in the contract, while Pilot countered that its Florida operation, which utilized drivers and dockworkers employed by independent labor contractors rather than by Pilot directly, was sufficiently distinct to be outside the scope of the national agreement.

"In an attempt to enforce their respective positions, the Florida locals in April, 1972, filed grievances pursuant to the NMFA, which under the contract were taken to arbitration before the Southern Multi-States Grievance Committee [Southern Committee], claiming that they were entitled to represent the Florida employees; on May 24, Pilot in turn filed a unit clarification petition with the NLRB asking that the Board construe its bargaining unit to exclude the Florida terminals. On June 12, Pilot also filed suit in the Middle District of Florida seeking, *inter alia,* to enjoin the Southern Committee from hearing the Unions' grievances until the NLRB had acted on its unit clarification petition. When the Southern Committee ruled adversely to Pilot on the Unions'

grievances on June 22, Pilot amended its action to ask that the Unions be enjoined from enforcing their award through a strike or other concerted activity. A hearing on this amended motion was held on July 7, and the request for injunction denied on the following day.

"On July 16, the Florida locals struck to enforce the Southern Committee award, and picketing was extended to Pilot's operations in other states. The strike continued until July 28, when it was temporarily enjoined by a federal district court in North Carolina on the ground that contractual grievance procedures had not been exhausted. This injunction was subsequently dissolved on September 8, 1972, following a decision in the Unions' favor by the National Grievance Committee, the final arbiter of disputes under the NMFA.

"With minor exceptions, both the Florida and North Carolina actions were then allowed to languish for almost a year, until in August, 1973, IBT filed a set of interrogatories in Florida and the following month moved to stay proceedings in North Carolina pending resolution of the Florida suit. Pilot's response was to file a notice of voluntary dismissal of its Florida action under F.R.C.P. 41(a)(1). The Unions then moved to vacate the notice of dismissal on [the ground that Rule 41 (a)(1) did not apply in these circumstances]."

B. Proceedings in the Court of Appeals

In an opinion written by Judge Dyer, the Fifth Circuit affirmed the district court ruling, stating that although it had "not previously confronted the exact question presented," various factors which apparently motivated the *Harvey* decision[1] (which decision the

[1] *Harvey Aluminum* v. *American Cyanamid*, 203 F.2d 105 (2 Cir. 1953), *cert. denied*, 345 U.S. 964, discussed *infra*, pp.

unions claimed was controlling) were not present in this case, but "[i]f . . . *Harvey* is to be read . . . as proscribing dismissal under F.R.C.P. 41(a)(1) whenever the merits of the controversy have been presented to the court in any manner, we must disagree with the decision and respectfully refuse to follow it." (506 F.2d at 916). The court found "without merit" the argument that a construction of the rule contrary to *Harvey* would permit forum shopping (*id.* at 917).

REASONS FOR GRANTING THE WRIT

The decision in this case presents a direct conflict between the Fifth and Second Circuits over the meaning of Rule 41(a)(1) of the Federal Rules of Civil Procedure. The court below held that Rule 41(a)(1) must be given a literal interpretation whereby a plaintiff enjoys the unqualified right to dismissal without prejudice even after the trial court has ruled against his motion for preliminary injunction following a full hearing raising the merits of his claim. This interpretation is directly at odds with the holding of the Second Circuit in *Harvey Aluminum* v. *American Cyanamid,* 203 F.2d 105 (1953), *cert. denied,* 345 U.S. 964 (*"Harvey"*) that plaintiff cannot dismiss as a matter of right once the court has ruled against him on a motion for preliminary injunction which raises the merits of the controversy. There Judge Augustus N. Hand, writing for a unanimous court, observed that at the hearing on plaintiff's motion for preliminary injunction "the merits of the controversy were squarely raised" and concluded that

> ". . . although the voluntary dismissal was attempted before any paper labeled 'answer' or 'motion for summary judgment' was filed, a literal

> application of Rule 41(a)(1) to the [case] would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached."[2]

The *Harvey* decision followed that of the Tenth Circuit in *Butler* v. *Denton*, 150 F.2d 687 (1945). There the Court held that voluntary dismissal under Rule 41(a)(1) was not available after a motion to intervene had been filed which "tendered justiciable issues for determination" (*id.* at 690) even though "[n]o answer had been filed or served at the time of the filing of the motion for leave to dismiss" (*id.* at 689). Professor Moore has cited *Harvey* and *Butler* as furthering "the purpose of Rule 41(a)(1) [which is to] allow plaintiff to dismiss as of right *before issue has been joined.*"[3] Under *Harvey* and *Butler* the trial courts in the Sec-

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[2] *Harvey, supra,* 203 F.2d at 108. In *Harvey* plaintiff sought specific performance of an alleged agreement to sell certain assets of a subsidiary of defendant. Plaintiff secured a temporary restraining order prohibiting the transfer of assets by defendant pending hearing on a motion for preliminary injunction. At the conclusion of the preliminary hearing, and prior to the filing of answer or motion for summary judgment by defendant, the trial court commented that plaintiff's chances of success on the merits were "remote" and denied plaintiff's motion. With no reason to be sanguine about its chances of success in the original forum, plaintiff filed a "Notice of Dismissal." The district court upheld this dismissal over defendant's objection, but the Court of Appeals reversed.

[3] 5 *Moore's Federal Practice,* ¶ 41.02[3] at 1028 (Emphasis in original). See 9 Wright and Miller, *Federal Practice and Procedure,* § 2363 at 157, discussing the "sensible result" reached in *Harvey.* Moreover, the philosophy underlying *Harvey* has been accepted not only by the Tenth Circuit in *Butler,* but by various district courts. *Robertson* v. *Limestone Manufacturing Co.,* 20 F.R.D. 365, 372-373 (W.D.S.C. 1957); *Love* v. *Silas Mason Co.,* 66 F. Supp. 753 (W.D.La. 1946).

ond and Tenth Circuits are instructed to administer Rule 41(a)(1) in accordance with its purpose, whereas the trial courts in the Fifth Circuit are required to dismiss at the plaintiff's request unless the precise exceptions delineated in the Rule are applicable and without regard to the requirements of fairness and justice.[4]

While Rule 41(a) was meant to reduce litigation by facilitating the voluntary dismissal of an action,[5] the literal interpretation given the Rule by the Fifth Circuit encourages a wasteful duplication of judicial effort and litigation expense. As the *Harvey* court observed, the need for research and preparation to oppose a motion for summary judgment was stressed by the Advisory Committee as the reason for amending Rule 41(a)(1) to exclude dismissal as of right if a summary judgment motion had been filed.[6] So here (as in *Har-*

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[4] The Fifth Circuit's attempt to distinguish *Harvey* on the basis of minor factual distinctions and "equitable considerations" is unconvincing in light of the record below which clearly demonstrates that (1) the Florida district court denied Pilot's motion for preliminary injunction after a full hearing squarely raising questions concerning the interpretation of the contract between Pilot and certain union defendants and (2) faced with a motion to stay the later-filed North Carolina proceeding, and an extensive and unanimous body of case law holding that in the absence of exceptional circumstances, the first federal district court which obtains jurisdiction of parties and issues should have priority and the second court should decline consideration of the action until the proceedings before the first court are terminated, Pilot evaded consideration of the forum issue by procuring an automatic dismissal in the Florida court.

[5] *Harvey, supra,* 203 F.2d at 107; 5 *Moore's Federal Practice,* ¶ 41.02[1] at 1019.

[6] *Harvey, supra,* 203 F.2d at 107; 5 *Moore's Federal Practice,* ¶ 41.01[4] at 1009.

vey) the parties had filed briefs on the motion for preliminary injunction, and the District Court had heard oral argument and ruled on the motion, which of course squarely raised the merits.

Given the Committee's clear demonstration of what they "were driving at"[7] and the admonition of Rule 1 that all Rules are to be interpreted to secure the "just, speedy and inexpensive determination of every action," it is clear the court below erred in "disagree-[ing] with [*Harvey*] and respectfully refus[ing] to follow it." This Court should now resolve the disagreement among the lower courts concerning the true meaning and proper application of Rule 41(a)(1).

---

[7] The oft-cited admonition of Justice Holmes with respect to statutory interpretation should also guide construction of rules of procedure:

> "We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, *but it is not an adequate discharge of duty for a court to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.*" *Johnson* v. *United States*, 163 Fed. 30, 32 (1 Cir. 1908) (Emphasis added).

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 72-160-ORL-CIV

PILOT FREIGHT CARRIERS, INC., *Plaintiff*,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, ET AL., *Defendants.*

Order

(Filed Nov. 21, 1973)

The defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed herein on October 16, 1973 a "Motion to Vacate Plaintiff's Notice of Dismissal." This motion was concurred in by the other defendants. The Court has considered the memoranda submitted in support of the motion by "IBT" and the memorandum in opposition to the motion submitted by the plaintiff. The defendant "IBT" relies primarily on the opinion of the Second Circuit in *Harvey Aluminum Co.* v. *American Cyanamid Co.*, 203 F.2d 105, 1953. Aside from the practical problems of applying the limitation imposed by *Harvey Aluminum* on the otherwise absolute terms of Rule 41(a)(1), Fed. R. Civ. P., it is doubtful that the rationale of *Harvey Aluminum* is applicable in this Circuit. See *American Cyanamid Co.* v. *McGee*, C.A. 5, 1963, 317 F.2d 295. In addition, it appears to the Court that Rule 41, Fed. R. Civ. P., has been amended on several occasions since the opinion in *Harvey Aluminum* and none of these amendments has adopted the limitation of the *Harvey Aluminum* opinion. Finally, it appears to the Court that the key element in the *Harvey Aluminum* case was a finding by the trial court in connec-

tion with plaintiffs' application for a preliminary injunction that ". . . the plaintiff's chances of success on the ultimate trial 'were remote if not completely nil.' " That element is not present here. For the foregoing reasons, it is

ORDERED that the motion of the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to vacate plaintiff's notice of dismissal is denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 21st day of November, 1973.

/s/ JOHN A. REED, JR.
Judge

APPENDIX B

(Caption omitted in printing)

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, *Circuit Judge:*

Subject to certain restrictions not here relevant, Federal Rule of Civil Procedure 41(a)(1) on its face grants a plaintiff an unconditional right to dismiss his complaint by notice and without order of the court at any time prior to the defendant's service of an answer or motion for summary judgment. On this appeal, we are invited to narrow the express parameters of this right by holding that such a dismissal is unavailable to a plaintiff who has argued, and lost, a motion for preliminary injunctive relief. We decline the invitation, and affirm the district court's refusal to vacate a notice of dismissal filed by a plaintiff who had been served with neither an answer nor a motion for summary judgment.

Pilot Freight Carriers, Inc. [Pilot] is a common carrier of general commodity freight operating primarily in the

eastern United States with lines as far west as Ohio. Its labor relations with non-supervisory personnel are in the main controlled by the National Master Freight Agreement [NMFA], a nationwide collective bargaining agreement periodically negotiated between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [IBT] on behalf of its locals and a multi-employer association of which Pilot is a member. In August, 1970, Pilot received authorization from the Interstate Commerce Commission to extend its lines south into Florida, and shortly thereafter established terminals in Jacksonville, Orlando, Tampa and Miami which were linked up to existing lines terminating in the Carolinas. Florida IBT locals at these points took the position that, because of this extension, the non-supervisory personnel automatically became subject to the terms of the NMFA by virtue of an accretion clause in the contract, while Pilot countered that its Florida operation, which utilized drivers and dockworkers employed by independent labor contractors rather than by Pilot directly, was sufficiently distinct to be outside the scope of the national agreement.

In an attempt to enforce their respective positions, the Florida locals in April, 1972, filed grievances pursuant to the NMFA, which under the contract were taken to arbitration before the Southern Multi-States Grievance Committee [Southern Committee], claiming that they were entitled to represent the Florida employees; on May 24, Pilot in turn filed a unit clarification petition with the NLRB asking that the Board construe its bargaining unit to exclude the Florida terminals. On June 12, Pilot also filed suit in the Middle District of Florida seeking, *inter alia*, to enjoin the Southern Committee from hearing the Unions' grievances until the NLRB had acted on its unit clarification petition. When the Southern Committee ruled adversely to Pilot on the Unions' grievances on June 22, Pilot amended its action to ask that the Unions be enjoined from enforcing their award through a strike or other con-

certed activity. A hearing on this amended motion was held on July 7, and the request for injunction denied on the following day.

On July 16, the Florida locals struck to enforce the Southern Committee award, and picketing was extended to Pilot's operations in other states. The strike continued until July 28, when it was temporarily enjoined by a federal district court in North Carolina on the ground that contractual grievance procedures had not been exhausted. This injunction was subsequently dissolved on September 8, 1972, following a decision in the Unions' favor by the National Grievance Committee, the final arbiter of disputes under the NMFA.

With minor exceptions, both the Florida and North Carolina actions were then allowed to languish for almost a year until in August, 1973, IBT filed a set of interrogatories in Florida and the following month moved to stay proceedings in North Carolina pending resolution of the Florida suit. Pilot's response was to file a notice of voluntary dismissal of its Florida action under F.R.C.P. 41(a)(1). The Unions then moved to vacate the notice of dismissal on essentially the same grounds urged before this Court, which motion was denied. This appeal ensued.

The Unions' most obvious hurdle on this appeal is of course the language of F.R.C.P. 41(a)(1), which provides in relevant part:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . .

While this Court has not previously confronted the exact question presented by this appeal, we have in the past ex-

pressed the view that Rule 41(a)(1) means precisely what it says. American Cyanamid Co. v. McGhee, 5 Cir. 1963, 317 F.2d 295, 297; *cf.* Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc., 5 Cir. 1973, 474 F.2d 250 (motion to dismiss for lack of personal jurisdiction, motion to challenge service of process, and filing of written interrogatories not the equivalent of an answer for the purposes of the Rule); Nix v. Fulton Lodge No. 2, Int. Ass'n of Machinists and Aerospace Workers, 5 Cir. 1972, 452 F.2d 794, cert. denied, 406 U.S. 946, 92 S.Ct. 2044, 32 L.Ed.2d 332 (motions to dismiss based on insufficiency of service of process, lack of subject matter jurisdiction, failure to state a claim, and res judicata not the equivalent of a motion for summary judgment for the purposes of the Rule).

Although conceding that Pilot was entitled to dismiss its complaint under a literal reading of Rule 41(a)(1), the Unions contend that we should nonetheless vacate the notice of dismissal by applying the principles enunciated by the Second Circuit in Harvey Aluminum, Inc. v. American Cyanamid Co., 2 Cir. 1953, 203 F.2d 105, cert. denied, 345 U.S. 964, 73 S.Ct. 949, 97 L.Ed. 1383, in which the court refused to permit a plaintiff to dismiss by notice following an extensive hearing on a motion for preliminary injunction. We decline to do so.

First, the exceptional equitable considerations which apparently motivated the *Harvey* decision are not present in this case. One of the factors stressed in *Harvey* was the district court's extensive consideration of the merits at the preliminary injunction hearing, culminating in its conclusion that the plaintiff's ultimate chances of success on the merits were "remote, if not completely nil." *Id.* at 107. No such claim of patent insubstantiality is made here. In reaching its conclusion that a sufficiently "advanced stage" of the litigation had been reached to preclude Rule 41(a)(1) dismissal, the Second Circuit also relied heavily on the

amount of preparation and expense incurred in defending at a hearing lasting several days and producing a 420 page record, while the hearing on Pilot's motion in this case consumed approximately two hours and substantially less paper. But more importantly in our view, the necessity of deciding in every case "How much preparation is too much?" in itself demonstrates the relative undesirability of the subjective approach endorsed in *Harvey* as opposed to the objective standards embodied in the Rule.

If however, as the appellants contend, *Harvey* is to be read more broadly as proscribing dismissal under F.R.C.P. 41(a)(1) whenever the merits of the controversy have been presented to the court in any manner, we must disagree with the decision and respectfully refuse to follow it. Since the substantial likelihood of plaintiff's success on the merits is one of the factors which must always be weighed by the district court in exercising its discretion to grant or withhold preliminary injunctive relief, *see, e.g.,* Allison v. Froehlke, 5 Cir. 1972, 470 F.2d 1123, 1126, such a view would amount to no less than a flat amendment of Rule 41(a)(1) to preclude dismissal by notice in any case where preliminary injunctive relief is sought. If such a comprehensive modification of the Rule is desirable, the request must be addressed to the Supreme Court and to Congress, not to this Court.

Finally, we find without merit the Unions' argument that the construction we place on the Rule permits forum shopping in the sense that a litigant may be able to choose a "friendly judge."

Pilot was entitled to dismiss its complaint under F.R.C.P. 41(a)(1). Accordingly, the district court's denial of the motion to vacate its notice of dismissal is

Affirmed.

APPENDIX C

Judgment

(Caption Omitted in Printing)

Before DYER, SIMPSON and CLARK, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 15, 1975

Issued as Mandate: Feb. 6, 1975

APPENDIX D

Rule Involved

RULE 41(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDES:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

MAY 29 1975

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v.

PILOT FREIGHT CARRIERS, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF PILOT FREIGHT CARRIERS, INC., RESPONDENT.

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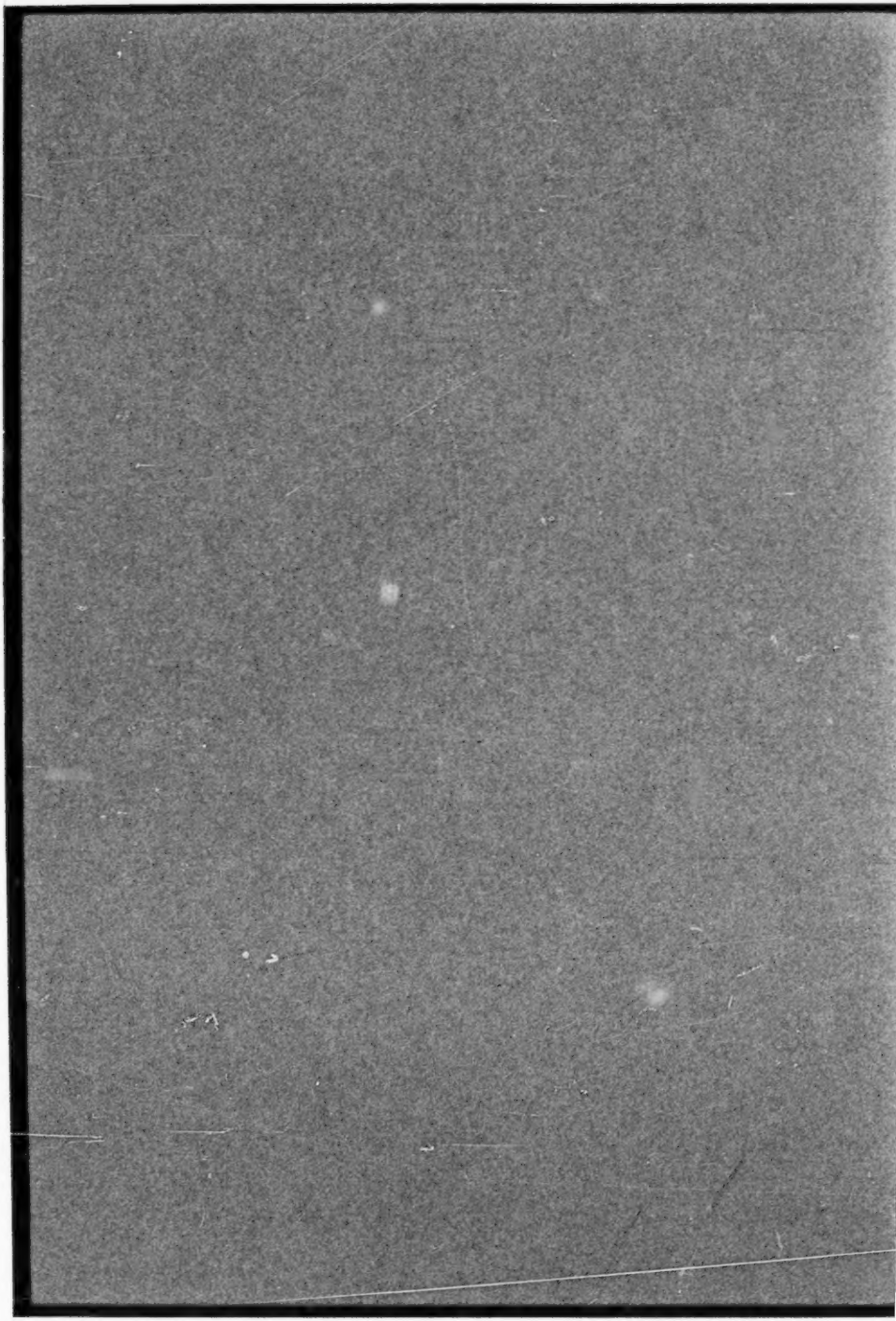

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Federal Rules of Civil Procedure:

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JUDICIAL CODE:

28 U.S.C. § 1254(1) 1

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BRIEF ON BEHALF OF PILOT FREIGHT CARRIERS, INC., RESPONDENT.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Florida, reprinted in App. A, pp. 1a-2a, as appended to the Petition, is unreported, and the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 506 F.2d 914.

JURISDICTION

The jurisdiction of this Court is correctly predicated upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly ruled that, on the facts of this case, the District Court correctly refused to vacate the plaintiff's Notice of Dismissal filed pursuant to Rule 41(a)(1), F.R.Civ.P.?

RULE INVOLVED

This Petition involves Rule 41(a)(1) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The factual background, together with the significant developments of this case in the lower courts, are adequately stated in Petitioner's Petition at pages 2 through 5.

ARGUMENT

I.

Where Defendant Has Filed Neither an Answer Nor a Motion for Summary Judgment, Rule 41(a)(1), F.R.Civ.P., Affords Plaintiff an Absolute Right To Dismiss Its Lawsuit.

Before Petitioners had filed either an answer or a motion for summary judgment, Respondent voluntarily dismissed its case by filing, pursuant to the provisions of Rule 41(a)(1), F.R.Civ.P., a Notice of Dismissal. The District Court ruled that this filing automatically dismissed Respondent's case, the Fifth Circuit affirmed, and this Court should not disturb those rulings.

Rule 41(a)(1), in its entirely, states:

> Subject to the provisions of Rule 23(e), of Rule 66, and any statute of the United States, *an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of*

> *a motion for summary judgment, whichever first occurs,* or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or included the same claim.

(emphasis added). Thus, as the Fifth Circuit stated in its opinion below, Rule 41(a)(1) "on its face grants a plaintiff an unconditional right to dismiss his complaint by notice and without order of the court at any time prior to the defendant's service of an answer or motion for summary judgment." 506 F.2d at 915. In the instant case, Respondent voluntarily dismissed its suit by filing a Notice of Dismissal. At the time of filing, Petitioners had filed neither an answer nor a motion for summary judgment. Hence, the Notice of Dismissal was properly and timely filed, and its force and effect under Rule 41(a)(1) should not be open to question. Rule 41(a)(1) means precisely what it says, no more and no less, and this Court should decline Petitioners' invitation to depart from its clear and unambiguous language.

II.

The History of Rule 41(a)(1), F.R.Civ.P., Offers No Support for Petitioners' Proposed "Exception" to That Rule.

In an effort to avoid the controlling language of Rule 41(a)(1), Petitioners contend that this Court should create a "judicial exception" to that Rule: Where the District Court has considered the merits of a plaintiff's case in a hearing upon a motion for a preliminary in-

junction, the plaintiff should not be permitted to dismiss its case automatically under Rule 41(a)(1). The creation of such an "exception" would, however, be contrary to the common-law and statutory history of Rule 41(a)(1).

At common law, a plaintiff had an absolute right to dismiss his suit without prejudice at any time before either verdict or judgment. *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924); *Barrett* v. *Virginian Ry. Co.*, 250 U.S. 473 (1919); *United States* v. *Norfolk & Western Ry.*, 118 F. 554 (4th Cir. 1902). Abuse of this right, however, often produced highly inequitable results. Plaintiffs would put defendants to the expense of a lengthy trial, only to dismiss when an adverse judgment seemed imminent. To curb these abuses, Rule 41(a)(1) was included in the first set of Federal Rules of Civil Procedure, effective September 16, 1938.

Under the 1938 version of Rule 41(a)(1), a plaintiff could voluntarily dismiss his suit by filing a Notice of Dismissal at any time before service of the answer. As originally drawn, however, Rule 41(a)(1) permitted voluntary dismissal by notice after a defendant had served a motion for summary judgment but before it had served an answer. In response to this defect, Rule 41(a)(1) was amended in 1946 to permit a plaintiff to dismiss his suit by Notice of Dismissal only before an adverse party had served either a motion for summary judgment or an answer.

Rule 41(a)(1) has not since been changed. If Congress had intended that a plaintiff be deprived of his absolute right to dismiss by any act of an adverse party other than the serving of an answer or a motion for summary judgment, it would have specified those cir-

cumstances in the statute. As the Fifth Circuit recognized in its opinion below,

> [s]ince the substantial likelihood of plaintiff's success on the merits is one of the factors which must always be weighed by the district court in exercising its discretion to grant or withhold preliminary injunctive relief, (citation omitted), . . . [Petitioners'] . . . view would amount to no less than a flat amendment of Rule 41(a)(1) to preclude dismissal by notice in any case where preliminary injunctive relief is sought.

506 F.2d at 916-17.

III.

The Decision of the Court of Appeals for the Fifth Circuit in This Case Presents No Conflict Among the Courts of Appeal on the Interpretation To Be Given Rule 41(a)(1), F.R. Civ.P.

In its decision below, the Fifth Circuit plainly held that, even were it persuaded that the decision of the Second Circuit in *Harvey Aluminum, Inc.* v. *American Cyanamid Co.*, 203 F.2d 106 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953), was correct, "the equitable considerations which apparently motivated the *Harvey* decision are not present in this case." 506 F.2d at 916. Accordingly, no decisional conflict among the Courts of Appeal requires resolution by this Court.

In *Harvey Aluminum*, plaintiffs filed suit seeking specific performance of an alleged contract. After a lengthy hearing that consumed four days, produced a record of some 420 pages of testimony and oral argument, and cost defendants over $84,000, the District Court denied preliminary injunctive relief. Plaintiffs then filed a Notice of Dismissal, and the District Court denied defendants' motion to vacate that Notice.

On appeal, the Second Circuit reversed, holding that the District Court, in refusing to vacate the Notice of Dismissal, had not complied with the "essential purpose" of Rule 41(a)(1):

> The purpose of this rule (Rule 41(a)(1)) is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined. . . . *The amount of research and preparation required of defendants was stressed by the Committee Notice when Rule 41(a)(1) was amended in 1948 as a reason for adding the reference to a motion for summary judgment. . . . The hearing . . . on the plaintiffs' motion for preliminary injunctive required several days of argument and testimony, yielding a record of some 420 pages.* Further, the merits of the controversy were squarely raised and the district court in part based its denial of the injunction on its conclusion that the plaintiff's chance of success on the merits was small. Consequently, although the voluntary dismissal was attempted before any paper labeled "answer" or "motion" for summary judgment" was filed, a literal application of Rule 41(a)(1) to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached.

203 F.2d 107-108 (emphasis added). The Second Circuit then remanded the case to the District Court with directions to vacate the Notice of Dismissal and, further, granted plaintiffs leave to move to dismiss the action under Rule 41(a)(2).[1]

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[1] Rule 41(a)(2), F.R.Civ.P., provides that, unless the provisions of Rule 41(a)(1) apply, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Although unclear in the Petition for Certiorari, Petitioners apparently contend that the District Court should have proceeded under Rule 41(a)(2) here.

In the instant case, unlike the *Harvey Aluminum* decision, there was no massive investment of time, preparation, and expense that could possibly justify disregarding the clear, unambiguous statutory language of Rule 41(a)(1). In *Harvey Aluminum, the* four-day hearing on the plaintiffs' motion for preliminary injunctive relief, together with the 420-page record and the $84,000 in costs for the defendants, established strong equitable considerations for the defendants. In the case before this Court, though, Petitioners have not made, and cannot make, such a strong showing of prejudice. The hearing on Respondent's motion for a temporary restraining order required slightly more than two hours; no witnesses testified for either side; and no massive, expensive record resulted from the hearing. Petitioners have never argued, to the District Court, to the Fifth Circuit, or to this Court, that the facts of the instant case are equivalent to those in *Harvey Aluminum,* nor can they.

The facts of the *Harvey Aluminum* decision were highly unusual, involving a voluntary dismissal after the plaintiffs' case had practically been tried, and the facts of the instant case in no way require or support the application of the so-called *Harvey Aluminum* "exception" to the clear, compelling language of Rule 41(a)(1). The *Harvey Aluminum* decision was the result of an aberrant set of facts, and the Second Circuit's decision should be restricted, if followed at all, to cases of a similar nature and factual setting.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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